1992

The State of Utah v. Abel Torres : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ABEL TORRES,	:	Case No. 920522-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a) (Supp. 1992), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. section 78-2a-3(2)(f) (1992), and Utah R. Crim. P. 26(2)(a), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are contained in the text of this brief or in Addendum A:

Utah Const. art. I, § 14
Utah Code Ann. § 58-37-8(2)(a)
Utah Code Ann. § 78-7-22
Utah R. Crim. P. 12
Utah R. Crim. P. 15
U.S. Const. amend.IV
8 U.S.C. § 1182(a)(23)

STATEMENT OF THE ISSUES[1] AND STANDARDS OF REVIEW

1. Did the police officers exceed the permissible scope of the stop by searching a car without a warrant and without proving that a driver, who predominantly spoke Spanish, had knowingly and intelligently understood and waived his "Miranda" rights,[2] read to him by an officer with a limited grasp of the foreign language? "[T]he state must demonstrate that the consent was voluntary." State v. Arroyo, 796 P.2d 684, 687 (Utah 1990); State v. Robinson, 797 P.2d 431, 437 (Utah App. 1990); State v. Marshall, 791 P.2d 880 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990). "In considering the trial court's action in denying defendant's motion to suppress, we will not disturb its factual evaluation unless its findings are clearly erroneous. However, in assessing the trial court's legal conclusions based on its factual findings, we afford it no deference but apply a 'correction of error standard.'" State v. Palmer, 802 P.2d 1249, 1251 (Utah App. 1990).

2. Did the court err in not suppressing the illegal "fruits" of the improper police conduct? "A trial court's legal conclusions are accorded no particular deference." Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

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1 The issues were raised pursuant to "the Utah Constitution as opposed to the Federal Constitution[.]" (R 91). Utah Const. art. I, § 14. Any references to federal law or other state court opinions are for guiding this Court in its independent determination, and not as authoritative weight. See Michigan v. Long, 463 U.S. 1032 (1983).

2 Miranda v. Arizona, 384 U.S. 436 (1966).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a) (Supp. 1992). On June 5, 1992, Defendant/Appellant Abel Torres moved "to suppress evidence illegally seized" by the arresting officers on February 1, 1992. (R 49-50). Following the suppression hearing, held on June 10, 1992, the court entered preliminary findings of fact. (R 163-70); see infra Point I. The parties also submitted written memoranda for the court's consideration. (R 51-71).

By stipulation, the parties agreed that in the event the court denied the motion the evidence heard during the motion to suppress proceeding could be viewed as evidence for a bench "trial." (R 52). The court denied Mr. Torres' motion. (R 71).

On July 31, 1992, the court sentenced Mr. Torres to an indeterminate term of one-to-fifteen years in the Utah State Prison. Mr. Torres was placed on informal probation to the court and held in jail pending his release to the I.N.S. (R 73).[3] Other relevant statements are stated elsewhere in the brief. See infra "Statement of Facts"; Point I.

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3 Although the record is unclear, Mr. Torres may have been deported. His appeal, however, is not mooted. "Far from mooting his appeal, [a defendant's] deportation makes the appeal all the more significant. As a result of his Yakima conviction [possession of a controlled substance (cocaine), the defendant] will be unable to return to this country." State v. Ortiz, 774 P.2d 1229 (Wash. 1989) (citing 8 U.S.C. § 1182(a)(23): alien convicted of narcotics offense "shall be excluded from admission into the United States")).

STATEMENT OF THE FACTS

The factual findings initially stated by the trial court are reflected by the following exchange:

> THE COURT: . . . I am willing to make some findings on the record, if you would like.
>
> [Counsel for Mr. Torres]: That would help.
>
> THE COURT: I suppose Officer [Cory] Lyman stated it as well as I could, and that is that the facts substantially are as indicated, that there was a contact between officer Ekker and a confidential informant [in Southern Utah]. That that confidential informant contacted two individuals [Larry and Gina Thatcher] who agreed to purchase for him a quantity of cocaine for nine hundred dollars, I think the amount was. And that based upon that contact that Officer Ekker followed him as he indicated in his testimony and listened to a conversation between them [the wired confidential informant and the Thatchers] that would lead him to reasonably believe that a sale of cocaine was going to go down in Salt Lake City. That he followed them in that vehicle to Salt Lake City and he in turn made contact with the Metropolitan--
>
> [Counsel for the State]: Metro-Narcotics.
>
> THE COURT: Metro-Narcotics people and asked for assistance. That there were Utah County officers who joined that procession into Salt Lake, as well. As I counted, there were seven cars and I will find that there were seven cars and seven police officers at least followed the confidential informant and the two suspects [Thatchers] to Salt Lake to a location on the west side of Salt Lake on Fourth South and about Seventh West; listened again to the conversation indicating that the person whom he was going to make contact, supply the narcotics was not then available, took them back to McDonald's Drive-in or Store and that he and the lady went in and remained while the other suspect took the vehicle that they had driven there and left. That Officer Lyman was in contact with Mr. Ekker and others who were pursuing his vehicle. And that he in turn engaged in a stop of that vehicle based upon the information that he had

from Officer Ekker and from the observations that he made.

Now, I will also find that at the time of the stop the defendant [Mr. Abel Torres] was driving the vehicle together with a female identified as his wife and that Officer Lyman attempted to state the Miranda warning in both English -- I don't think he even tried in English but in Spanish. I am not convinced that the defendant understood what was going on and I am not sure that he understood and perceived his rights to counsel before making a statement. I do have some doubt about his consent to search the car and his home. I am almost willing to rule however that there was a reasonable articulable suspicion that there were narcotics and drugs, that he was part of the drug transaction and that the search of the car was reasonable under those circumstances. But if you want to brief it, that's fine.

[Counsel for Mr. Torres]: I think two things with regard to your findings, I would ask the court to consider including in those verbal findings two things, that once Detective Lyman began the observation of the car, that the -- he lost sight of the car for a period of approximately fifteen minutes and re-encountered the car by positioning himself in what he thought to be a logical return route.

THE COURT: I will make that a finding.

[Counsel for Mr. Torres]: The additional fact I think that has been proved is that when the stop was made that the individuals in the car did not match the description of the people who were believed to have -- or supposed to be in the car.

THE COURT: I agree. I will make that finding. I think the issue is whether or not it is reasonable and there is a reasonable inference that the defendant was a part of this entire transaction because of the events and circumstances that had occurred before the stop.

[Counsel for Mr. Torres]: I am assuming from what the court said you are prepared to rule today that there was reasonable articulable suspicion to stop. I have heard the court indicate some concern over the subsequent waiver and consent. Is that an issue that you are still --

THE COURT: I don't think you need address that. I think I am willing to--am ready to concede there was probably no proper waiver and consent for the search of the house at least. But I am not sure that you need a waiver and consent to search the car and the circumstances of that search. Are you arguing that they -- that the consent was necessary to search the car?

[Counsel for Mr. Torres]: Yes.

THE COURT: [Counsel for the State], do you believe that to be the fact?

[Counsel for the State]: No. I am concerned a little about the consent. I have seen enough people who speak foreign languages come to court and play games as far as their knowledge.

THE COURT: I agree that can be done very easily.

[Counsel for the State]: It is my opinion that that's being done today, based on the officer's testimony.

THE COURT: Let me reserve a ruling on that issue. If you want to --

[Counsel for the State]: I don't know how I am going to prove that. I can't obviously believe that--

THE COURT: You put on everything you have got. Let me indicate that I will probably want to reconsider and think about that issue.

[Counsel for the State]: I think the officer testified that there was some conversations both in English and Spanish, I think it is also clear that under our United States Supreme Court case law that Miranda warnings and the individual words inside the Miranda don't need to be explained and defined other than do you understand each of the rights explained to you. If the answer is yes, the officer is allowed to proceed.

THE COURT: Let me say I am a little more concerned about the issue of the waiver and consent than I am of the issue of reasonable suspicion.

[Counsel for Mr. Torres]: I would ask the court to find that the officer admitted to deceiving the

defendant prior to the first consent to search.

THE COURT: I will find that he expressed some facts that were not factually true.

[Counsel for the State]: The deception is though we have been watching you, we know you are dealing drugs and the defendant goes, you got me. I guess that's an exception, but it is not the kind of thing that would be unexpected of a narcotics dealer. If they don't lie or say we have got a warrant or, you know, he said, "We have been watching you. We know you have got drugs." He said, "Yeah, you are right." I don't see that that is necessarily a deception. I am concerned about the defendant's standing to say you can't search the seat of this car. It is not even his car. Officers only see him driving it and with some suspicion that this car is being used to go pick up some cocaine. That's the reasonable suspicion that suspicion is exactly confirmed. The only difference is --

THE COURT: He is in possession of the car and obviously with the consent of the owner.

[Counsel for the State]: That's not true -- the owner is over there at McDonald's.

THE COURT: At least he is in possession of the car with the consent of the person who has the right to have -- I assume the young lady who's registered owner of the car is you know -- what you want me to believe is this--she said, "Take my car and go down and get this stuff."

[Counsel for the State]: I can supply cases to the court if you need to the effect that an onerable situation, even Utah, the officer is allowed to search the area in the immediate vicinity of the driver, passenger of the car. That is for primarily the driver's safety. The officer will testify that coke was found under the seat.

THE COURT: If the officer has a reasonable articulable suspicion under the cases I am familiar with he has the right to do a search of the car, doesn't he?

[Counsel for the State]: Right.

THE COURT: With or without consent.

> [Counsel for Mr. Torres]: That goes to the Terry issue and whether the scope exceeds what he is intending to do. Certainly, that goes to the house. You can't forget that the officer said that he believed that the so-called consent was in part based upon the deception that the officer had made to him, so if we should brief that issue, Your Honor, when would you want us to do that?
>
> THE COURT: Ten days.

See (R 163-69) (Transcript of Motion to Suppress Proceedings, dated June 10, 1992) (attached as Addendum B).

Each party then submitted written memoranda to the trial court. (R 52-70). The court, however, simply denied the suppression motion in a minute entry. (R 71). No findings or conclusions on consent were rendered by the court.

SUMMARY OF THE ARGUMENT

While the existence of "reasonable suspicion" and "consent" were both in dispute, the trial court's preliminary findings and its summary ruling suggests that its disposition of the first issue eliminated any need for it to rule on the second issue. Even if reasonable suspicion existed, however, the court still should have reached the issue of consent. Its failure to do so requires the case to be vacated and remanded.

Alternatively, the State failed to meet its burden of showing that Mr. Torres knowingly and intelligently consented to the officer's search of the car. Mr. Torres, an individual who predominately spoke Spanish, did not understand the Miranda rights inadequately communicated to him by the investigating officer. The "fruits" therefrom should have been suppressed.

ARGUMENT

POINT I

REVERSAL IS REQUIRED BECAUSE OF THE TRIAL COURT'S FAILURE TO ENTER ADEQUATE FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In State v. Ramirez, 817 P.2d 774 (Utah 1991), the Utah Supreme Court vacated the defendant's conviction and remanded the case for retrial on the following grounds:

> in ruling on Ramirez's pretrial motion to suppress, the trial judge failed to make adequate findings and that absent the findings of fact and conclusions of law required by rule 12(c) of the Utah Rules of Criminal Procedure, it is impossible for us to determine the lawfulness of the stop and seizure. Utah R. Crim. P. 12(c).

817 P.2d at 776. The holding in Ramirez governs the present appeal. Id.; see also Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).[4]

In Ramirez, the defendant moved to suppress evidence based on, inter alia, an unlawful identification procedure and an illegal search and seizure:

> [Prior to trial, Ramirez] moved to suppress all evidence seized from him, on [the] grounds that the seizure violated his rights under the federal and state constitutions. The trial court denied the motion to suppress the identification, but took under advisement the motion to suppress based on unlawful

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4 Another case consistent with the holding in Ramirez is Acton v. Deliran, 737 P.2d 996 (Utah 1987). See id. at 999 (retrial appropriate in light of the inadequate court findings and conclusions, and because the trial judge had retired). The trial judge here, the Honorable James S. Sawaya, has also retired.

> stop and seizure. The trial judge never explicitly ruled on this pretrial motion.
>
> . . .
>
> As noted, the record before us does not include an explicit ruling on the lawfulness of the stop and seizure. The trial court's minute entry denying the motion for a new trial reaffirms the court's earlier ruling refusing to suppress the evidence. The earlier ruling, however, does not state clearly whether the refusal to suppress is based only on a determination that the identification procedure was lawful or also on an unrecorded ruling on the lawfulness of the stop and seizure.

817 P.2d at 777-78.

As in Ramirez, the trial court here "took under advisement the motion to suppress based on [consent]." See (R 166-67) (after the June 10, 1992 suppression hearing, the court stated, "Let me reserve a ruling on that issue [consent] . . . I will probably want to reconsider and think about that issue [consent]). Following these comments and other statements favorable to Mr. Torres on the lack of lawfully obtained consent, see generally Point II, the court's July 21, 1992 minute entry then stated nothing in a formal manner on either the "reasonable suspicion" issue or the "lack of consent" issue. (R 71). The minute entry just summarily denied the motion to suppress.

The court's denial is inconsistent with its statements pertaining to consent:

> Officer Lyman attempted to state the Miranda warning in both English -- I [the court] don't think he even tried in English but in Spanish. I am not convinced that the defendant understood what was going on and I

> am not sure that he understood and perceived his rights to counsel before making a statement. I do have some doubt about his consent to search the car and his home.

(R 164-65); see also (R 167) ("Let me say I [the court] am a little more concerned about the issue of the waiver and consent than I am of the issue of reasonable suspicion").

Like the search and seizure issue in Ramirez, the issues in the instant action, particularly the inadequacy of consent, cannot be deemed to have been implicitly supported by the court's denial of the suppression motion. See State v. Ramirez, 817 P.2d 774, 787 (Utah 1991). The court's own expressed statements make such an implicit ruling unreasonable. A retrial is necessary. Id. at 788 ("If the ambiguity of the facts makes this assumption unreasonable, however, we remand for a new trial"); see also id. at 787-88 n.6.

At best, the court informally expressed a lack of concern with the "reasonable suspicion" issue. (R 167); (R 165) ("I [the court] am almost willing to rule however that there was a reasonable articulable suspicion that there were narcotics and drugs, that he was part of the drug transaction and that the search of the car was reasonable under those circumstances"). Even assuming, arguendo, that reasonable suspicion did exist, see infra note 6, reversal still is required because the court did not conclude that Mr. Torres consented to the search nor could it have held that consent was knowingly and intelligently obtained. See infra Point II; compare Ramirez, 817 P.2d at 786-89 (taking "under advisement" a suppression

issue and failing to explicitly rule on it was reversible error even though another issue [i.e. identification] was properly discounted), with (R 166-67) ("Let me [the court] reserve a ruling on that issue [consent] . . . I will probably want to reconsider and think about that issue [consent]).

Although the trial court had intended to guide the parties with its statements, its preliminary factual findings and legal conclusions were inadequate for "meaningful review [of] the issues on appeal." 817 P.2d at 788 (quoting State v. Lovegren, 798 P.2d 767, 770 (Utah App. 1990)). The minute entry denying Mr. Torres' motion to suppress was not enough. (R 71). His conviction should be vacated with an order remanding the case for a new trial. See Ramirez, 817 P.2d at 776, 789 ("To ask the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence"); Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).

POINT II

THE OFFICERS EXCEEDED THE PERMISSIBLE SCOPE OF THE INTERFERENCE

In the alternative and assuming the stop of the "charcoal gray" Oldsmobile was not improper,[5] the officers subsequent actions exceeded the permissible scope of the investigative intrusion. The

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5 Appellant acknowledges that under the federal constitution, U.S. Const. amend. IV, the officers possessed "reasonable suspicion" for the stop. Appellant does not address (nor concede) the initial stop pursuant to a state constitutional analysis.

occupants of the stopped car, Abel Torres and his wife, were admittedly "in no way similar" to the persons suspected of being involved in the drug transaction. (R 144, 165). The investigating officers had no knowledge of a female passenger and the individual driving the car, Mr. Torres, did not match the description of the targeted suspect. (R 143-44). Sergeant Cory Lyman, an officer involved in the investigation once the targeted Oldsmobile drove into Salt Lake County, testified, "I was wrong about the occupants." (R 146, 165).

Lyman, who "didn't really participate in the surveillance" and who "couldn't see" the Oldsmobile leave McDonald's, (R 127, 130), "monitor[ed] the [police] radio" to ascertain where the car was going. (R 130-31). Other officers reported that the car went to "960 West on 400 South[,]" the alley way where the car had been before. (R 131). The driver, Larry Thatcher, then exited the car. (R 131). Even though Lyman believed there were "five [police] cars involved in this surveillance[,]" none of the officers reported seeing anyone return to the car. (R 131). Two people, however, were later seen in the Oldsmobile as it left the alley. (R 131).

As the officers attempted to follow the car, they lost track of it for approximately fifteen-to-twenty minutes. (R 144). The police "figured the suspect was watching their vehicle and suspected that [the officers] were following them . . ." (R 132). The officers "pulled off in order to relieve the suspicion." (R 132).

Thinking that the car would return to the alley, the officers waited at a nearby location. (R 132). When the car approached, a marked police car "pulled in behind them . . . [and turned on] the emergency equipment. The driver pulled over immediately." (R 134). After the uniformed officers told the driver and the passenger to get out of the car, "the driver was -- was a different person than I [Sergeant Lyman] had anticipated. I was expecting the male suspect [Larry Thatcher] to get out." (R 135). Lyman ordered the stop because the car was the same as the identified vehicle. (R 134).

The occupants, however, were different than expected. The driver was Abel Torres and the passenger was his wife. (R 135). Nevertheless, the officers confronted Mr. Torres and proceeded to question him. (R 135). The issues now in dispute are whether the State proved that Mr. Torres had validly waived his constitutional rights and whether the two ensuing searches were illegal.

At the outset, the trial court did not hold that "probable cause" existed. Hence, even if the officers possessed "reasonable suspicion," the officers' search of the car would have exceeded the scope of the "level two" investigative detention. See Florida v. Royer, 460 U.S. 491, 499 (1983) ("In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects")); cf. State v. Larocco, 794 P.2d 460 (Utah 1990); State v. Holmes, 774 P.2d 506 (Utah App. 1990). The court's "ruling" to the contrary was in error. See (R 165)

(emphasis added) ("I [the court] am almost willing to rule however that there was a reasonable articulable suspicion that there were narcotics and drugs, that he was part of the drug transaction and that the search of the car was reasonable under those circumstances").[6] See also Point I.

The parties here do not dispute that the officers had no warrant; they differ only on the unlawfulness of the procured consent. "Searches conducted 'outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.'" State v. Arroyo, 796 P.2d 684, 687 (Utah 1990) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). "[W]here the validity of the search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." Royer, 460 U.S. at 497; accord Arroyo, 796 P.2d at 687.

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of

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6 As suggested by the following statement, the trial court probably viewed "consent" as an nonissue because of its "holding" that reasonable suspicion existed. (R 168) ("If the officer has a reasonable articulable suspicion under the cases I [the court] am familiar with he has the right to do a search of the car [with or without consent], doesn't he?).

> fundamental constitutional rights and there must be convincing evidence that such rights were waived.

United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977), quoted in State v. Carter, 812 P.2d 460, 467 (Utah App. 1991); accord State v. Marshall, 791 P.2d 880, 887-88 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990). The State failed to meet its burden in the case at bar. It simply did not establish that, one, the officer properly communicated the "Miranda" rights to Mr. Abel Torres, and, two, that Abel knowingly and intelligently waived those rights before he "consented" to the officer's search of the car.

The actions (or inactions) of Sergeant Lyman reflected his own uncertainty about his ability to communicate properly with Mr. Torres. Before Sergeant Lyman attempted to converse with Torres:

> there [were] a few minutes [in] between, because I [Sergeant Lyman] went and talked to Mike Blackhurst. He is a sergeant with Utah County Task Force. I asked if they had anyone--if the officers had contacted. They indicated he [Mr. Torres] spoke only Spanish. I asked if they had any officers that could converse with him in Spanish. They didn't have anyone who spoke any Spanish. I speak a little bit of Spanish. So I talked to him [Torres] and assumed the role thereof, being the one to talk to him.

(R 135-36).

The trial court was not swayed by Lyman's references to his long since past "[j]unior high through high school" Spanish classes. (R 149). Sergeant Lyman is 35 years old. He has had no formal training in the foreign language. (R 149). Lyman claimed to be able to read, write, and "converse" in Spanish, yet he admitted

that he did "not consider [him]self capable of doing what this gentleman [the Spanish interpreter was] doing and translate." (R 153).

The trial court determines if an interpreter is necessary, see Utah R. Crim. P. 15; otherwise, all "[j]udicial proceedings shall be conducted in the English language." Utah Code Ann. § 78-7-22. The presence of a Spanish interpreter during the lower court proceedings reflected both the trial court's belief that an interpreter was needed to properly apprise Torres of his rights and the admitted shortcomings of Lyman's "assum[ption] [of] the role" of interpreter. Landereous v. State, 480 P.2d 273 (Okla. Crim. App. 1971). As explained by the trial court:

> Officer Lyman attempted to state the Miranda warning in both English -- I [the court] don't think he even tried in English but in Spanish. I am not convinced that the defendant understood what was going on and I am not sure that he understood and perceived his rights to counsel before making a statement. I do have some doubt about his consent to search the car and his home.

(R 164-65). Sergeant Lyman failed to properly communicated the "Miranda" rights to Mr. Torres. See Arroyo, 796 P.2d at 684 ("case law holds that a consent which is not voluntarily given is invalid").

On a related note, even if the trial court had found that Sergeant Lyman's limited grasp of Spanish sufficed for the reading of Miranda rights--a finding the court was unwilling to make--the sergeant's deceptive approach further invalidated the consent. The court found that the sergeant "expressed some facts that were not

factually true." (R 167). Lyman deceived Torres by telling him that the officers had been watching him when they really had not. (R 155). Sergeant Lyman's own testimony follows:

> Q [Counsel for Mr. Torres:] You [Lyman] deceived him [Abel Torres]?
>
> A [Sergeant Lyman:] Yes, I did.
>
> Q And you deceived him prior to getting his consent to search the car; isn't that right?
>
> A Yes, to some extent, I let him think I knew more than I knew. That was my intention.
>
> Q You don't think his consent would have been affected by your having lied to him?
>
> A It was probably going to be affected by it. That's why I mean -- it is an interviewing technique, trying to find out information.
>
> Q Lying is an interviewing technique?
>
> A Sometimes I prefer to call it subterfuge or something like that.
>
> Q So his subsequent consent to have you search his car then his house is based upon lies that you told him which you admit might have affected his consent; isn't that right?
>
> A I admit it probably would have affected his perception of what was happening.

(R 155).

Mr. Torres, who had not understood the rights read to him, (R 160, 164), was then improperly deceived into waiving his rights. He is a man with a second grade level of education who had never encountered such problems before. (R 159, 162); cf. Clewis v. Texas, 386 U.S. 707 (1967) (factors of weight in an involuntary

determination was the defendant's fifth grade education and the fact that he "had apparently never been in trouble with the law before"); see State v. Robinson, 797 P.2d 431, 437 (Utah App. 1990) (citation omitted) ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, a court must take into account both the details of police conduct and the characteristics of the accused, which include 'subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents'").

Sergeant Lyman also failed to inform Torres that he had a right to refuse the officers' search into his car or house. (R 160). Although "the government need not establish such knowledge as the sine qua non of an effective consent[,] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973), quoted in State v. Robinson, 797 P.2d 431, 437 (Utah App. 1990), this Court has noted that such a factor may be reflective of invalidly obtained consent: when defendant [Robinson] was "asked [by officers] to consent to a search of the vehicle[,] [t]here [was] no evidence that Robinson was aware or was informed that he did not have to accede to the trooper's request." Robinson, 797 P.2d at 438; see also State v. Hewitt, 200 Utah Adv. Rep. 53 n.1 (Utah App. 1992) (in Appellant Hewitt's briefs, incorporated herein by reference, Hewitt argued that the state constitution requires consent for a search to be knowing as well as voluntary).
Mr. Torres' consent was neither voluntarily, nor knowingly. It was improperly and deceptively procured. The federal principles of Robinson apply here with at least equal, if not greater force to

Appellant Torres' state constitutional argument. Cf. State v. Larocco, 794 P.2d 460 (Utah 1990) (more protective state constitutional interpretation of the automobile exception to the warrant requirement); State v. Sims, 808 P.2d 141 (Utah App. 1991); State v. Thompson, 760 P.2d 1162, 1164 (Idaho 1988) (citation omitted) ("Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions").

Again, Appellant Torres notes that the above-stated "findings" and "conclusions" on consent were ultimately taken under advisement or "reserve[d]" for "reconsider[ation]." (R 166-67). The trial court's failure to finalize and formalize its ruling constitutes grounds for reversal, see Point I, and in light of its statements, the court's (minute entry) denial of the suppression motion cannot implicitly support a favorable ruling on consent. Cf. Ramirez, 817 P.2d at 787-88 n.6. More likely, the court mistakenly viewed the existence of reasonable suspicion as determinative of the matter. See supra note 6.

In any case, at the close of the suppression hearing (which was the evidentiary equivalent of testimony to be presented at trial, [R 52]), the State itself expressed doubt as to whether consent was or could have been established:

> THE COURT: . . . Are you [Counsel for Mr. Torres] arguing that they -- that the consent was necessary to search the car?
>
> [Counsel for Mr. Torres]; Yes

> THE COURT: [Counsel for the State], do you believe that to be the fact?
>
> [Counsel for the State]: No. I am concerned a little about the consent. I have seen enough people who speak foreign languages come to court and play games as far as their knowledge.
>
> THE COURT: I agree that can be done very easily.
>
> [Counsel for the State]: It is my opinion that that's being done today, based on the officer's testimony.
>
> THE COURT: Let me reserve a ruling on that issue. If you want to --
>
> [Counsel for the State]: I don't know how I am going to prove that. I can't obviously believe that --
>
> THE COURT: You put on everything you have got. Let me indicate that I will probably want to reconsider and think about that issue.

(R 166-67) (emphasis added). The State did not carry its burden of proving that consent was knowingly and voluntarily obtained. (R 164) ("I [the court] do have some doubt about his consent to search the car and his home"); see State v. Sampson, 808 P.2d 1100, 1108 (Utah App. 1990) ("the state has a heavy burden to establish both that a defendant understood his Miranda rights and that he voluntarily waived them""), on petition for reh'g, (Utah App. 1991), cert. denied, 817 P.2d 327 (Utah 1991), cert. denied, --- U.S. ---, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992); State v. Carter, 812 P.2d 460, 467 (Utah App. 1991) (quoting United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977) ("the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived")); State v. Ramirez, 817 P.2d 774, 786 (Utah 1991) ("in

considering the lawfulness of the stop and the seizure and the search, the trial court should regard with caution any claim that the suspect "consented.").

POINT III

THE COURT ERRED IN NOT SUPPRESSING THE ILLEGALLY OBTAINED EVIDENCE

"[I]nformation gained by law enforcement officers during an illegal search cannot be used in a derivative manner to obtain other evidence . . . " United States v. Hearn, 496 F.2d 236, 243-44 (7th Cir.), cert. denied, 419 U.S. 1048 (1974), quoted in State v. Arroyo, 796 P.2d 684, 691 (Utah 1990). Mr. Torres' "consent," improperly obtained, cannot be used to justify the officer's search of the car. Evidence from the car should have been suppressed. (R 137). The search of the house, which occurred "consensually" and immediately after the officer's seizure of the substances found in the car, were also unlawfully obtained for reasons similar to those already discussed. See Point II; Wong Sun v. United States, 371 U.S. 471 (1963); State v. Sampson, 808 P.2d 1100, 1113 (Utah App. 1990) ("the trial court must exclude all primary evidence elicited during the custodial interrogation and all incriminating evidence derived therefrom which is not saved by an exception to the exclusionary rule"), on petition for reh'g, (Utah App. 1991), cert. denied, 817 P.2d 327 (Utah 1991), cert. denied, --- U.S. ---, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992); State v. Carter, 812 P.2d 460 (Utah App. 1991) (prior police illegality was not sufficiently attenuated from the taint).

CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's denial of his motion to suppress and remand for a new trial.

SUBMITTED this 15th day of January, 1993.

Don S. Fujino

RONALD S. FUJINO
Attorney for Defendant/Appellant

BROOKE C. WELLS
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 15th day of January, 1993.

Don S. Fujino

RONALD S. FUJINO

DELIVERED by _____

this _____ day of January, 1993.

_____

ADDENDUM A

58-37-8. Prohibited acts — Penalties.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

78-7-22. English language for proceedings.

Judicial proceedings shall be conducted in the English language.

Amendment IV of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 14 of the Constitution of Utah provides:

> **Sec. 14. [Unreasonable searches forbidden--Issuance of warrant.]**
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation.

Rule 12. Motions.

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

(1) defenses and objections based on defects in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;

(2) motions concerning the admissibility of evidence;

(3) requests for discovery where allowed;

(4) requests for severance of charges or defendants under Rule 9; or

(5) motions to dismiss on the ground of double jeopardy.

(c) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(d) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(e) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(f) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

Rule 15. Expert witnesses and interpreters.

(a) The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.

(b) The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

ADDENDUM B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,
Plaintiff,

v.

ABEL TORRES,
Defendant

ORIGINAL

Case No. 921900405

Proceedings before the Honorable
Judge James S. Sawaya
On June 10, 1992

Cathy Gallegos
Official Court Reporter
License No. 177
240 East 400 South
Room A-533 Courts Building
Salt Lake City, Utah 84111

MR. SKORDAS: No, Your Honor.

MS. WELLS: Unless the court feels that it has sufficient information about the case and the law that governs it, and we are prepared to rule now, I am prepared to ask that it be briefed.

THE COURT: No problem. Do you want to brief it? That's fine. I am willing to make some findings on the record, if you would like.

MS. WELLS: That would help.

THE COURT: I suppose Officer Lyman stated it as well as I could, and that is that the facts substantially are as indicated, that there was a contact between officer Ekker and a confidential informant. That that confidential informant contacted two individuals who agreed to purchase for him a quantity of cocaine for nine hundred dollars, I think the amount was. And that based upon that contact that Officer Ekker followed him as he indicated in his testimony and listened to a conversation between them that would lead him to reasonably believe that a sale of cocaine was going to go down in Salt Lake City. That he followed them in that vehicle to Salt Lake City and he in turn made contact with the Metropolitan--

MR. SKORDAS: Metro-Narcotics.

THE COURT: Metro-Narcotics people and asked for assistance. That there were Utah County officers who

joined that procession into Salt Lake, as well. As I counted, there were seven cars and I will find that there were seven cars and seven police officers at least followed the confidential informant and the two suspects to Salt Lake to a location on the west side of Salt Lake on Fourth South and about Seventh West; listened again to the conversation indicating that the person whom he was going to make contact, supply the narcotics was not then available, took them back to McDonald's Drive-in or Store and that he and the lady went in and remained while the other suspect took the vehicle that they had driven there and left. That Officer Lyman was in contact with Mr. Ekker and others who were pursuing his vehicle. And that he in turn engaged in a stop of that vehicle based upon the information that he had from Officer Ekker and from the observations that he made.

Now, I will also find that at the time of the stop the defendant was driving the vehicle together with a female identified as his wife and that Officer Lyman attempted to state the Miranda warning in both English -- I don't think he even tried in English but in Spanish. I am not convinced that the defendant understood what was going on and I am not sure that he understood and perceived his rights to counsel before making a statement. I do have some doubt about his consent to search the car and his

home. I am almost willing to rule however that there was a reasonable articulable suspicion that there were narcotics and drugs, that he was part of the drug transaction and that the search of the car was reasonable under those circumstances. But if you want to brief it, that's fine.

MS. WELLS: I think, two things with regard to your findings, I would ask the court to consider including in those verbal findings two things, that once Detective Lyman began the observation of the car, that the -- he lost sight of the car for a period of approximately fifteen minutes and re-encountered the car by positioning himself in what he thought to be a logical return route.

THE COURT: I will make that a finding.

MS. WELLS: The additional fact I think that has been proved is that when the stop was made that the individuals in the car did not match the description of the people who were believed to have -- or supposed to be in the car.

THE COURT: I agree. I will make that finding. I think the issue is whether or not it is reasonable and there is a reasonable inference that the defendant was a part of this entire transaction because of the events and circumstances that had occurred before the stop.

MS. WELLS: I am assuming from what the court said you are prepared to rule today that there was

reasonable articulable suspicion to stop. I have heard the court indicate some concern over the subsequent waiver and consent. Is that an issue that you are still --

THE COURT: I don't think you need address that. I think I am willing to--am ready to concede there was probably no proper waiver and consent for the search of the house at least. But I am not sure that you need a waiver and consent to search the car and the circumstances of that search. Are you arguing that they -- that the consent was necessary to search the car?

MS. WELLS: Yes.

THE COURT: Mr. Skordas, do you believe that to be the fact?

MR. SKORDAS: No. I am concerned a little about the consent. I have seen enough people who speak foreign languages come to court and play games as far as their knowledge.

THE COURT: I agree that can be done very easily.

MR. SKORDAS: It is my opinion that that's being done today, based on the officer's testimony.

THE COURT: Let me reserve a ruling on that issue. If you want to --

MR. SKORDAS: I don't know how I am going to prove that. I can't obviously believe that--

THE COURT: You put on everything you have got.

Let me indicate that I will probably want to reconsider and think about that issue.

MR. SKORDAS: I think the officer testified that there was some conversations both in English and Spanish. I think it is also clear that under our United States Supreme Court case law that Miranda warnings and the individual words inside the Miranda don't need to be explained and defined other than do you understand each of the rights explained to you. If the answer is yes, the officer is allowed to proceed.

THE COURT: Let me say I am a little more concerned about the issue of the waiver and consent than I am of the issue of reasonable suspicion.

MS. WELLS: I would ask the court to find that the officer admitted to deceiving the defendant prior to the first consent to search.

THE COURT: I will find that he expressed some facts that were not factually true.

MR. SKORDAS: The deception is though we have been watching you, we know you are dealing drugs and the defendant goes, you got me. I guess that's an exception, but it is not the kind of thing that would be unexpected of a narcotics dealer. If they don't lie or say we have got a warrant or, you know, he said, "We have been watching you. We know you have got drugs." He said, "Yeah, you are

right." I don't see that that is necessarily a deception. I am concerned about the defendant's standing to say you can't search the seat of this car. It is not even his car. Officers only see him driving it and with some suspicion that this car is being used to go pick up some cocaine. That's the reasonable suspicion that suspicion is exactly confirmed. The only difference is --

THE COURT: He is in possession of the car and obviously with the consent of the owner.

MR. SKORDAS: That's not true -- the owner is over there at McDonald's.

THE COURT: At least he is in possession of the car with the consent of the person who has the right to have -- I assume the young lady who's registered owner of the car is you know -- what you want me to believe is this--she said, "Take my car and go down and get this stuff."

MR. SKORDAS: I can supply cases to the court if you need to the effect that an onerable situation, even Utah, the officer is allowed to search the area in the immediate vicinity of the driver, passenger of the car. That is for primarily the driver's safety. The officer will testify that coke was found under the seat.

THE COURT: If the officer has a reasonable articulable suspicion under the cases I am familiar with he

has the right to do a search of the car, doesn't he?

MR. SKORDAS: Right.

THE COURT: With or without consent.

MS. WELLS: That goes to the Terry issue and whether the scope exceeds what he is intending to do. Certainly, that goes to the house. You can't forget that the officer said that he believed that the so-called consent was in part based upon the deception that the officer had made to him, so if we should brief that issue, Your Honor, when would you want us to do that?

THE COURT: Ten days.

If you don't want to respond, you don't have to.

MR. SKORDAS: I want to. I will be gone two weeks. This is Kent Morgan's case he asked me to try.

THE COURT: Respond within five days after you return. This man will sit in jail all the time?

MS. WELLS: That's the problem.

THE COURT: My inclination is it won't make any difference. He will be sitting in jail one way or another.

MS. WELLS: I don't know, but I believe there's also an immigration hold. I should have that--we should have those in in ten days; is that right?

THE COURT: I think so. Does that give you enough time?

MR. SKORDAS: We respond ten days after.